YOSEMITE GOLD MINING AND MILLING COMPANY *v.* EMERSON.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 69. Argued December 13, 1907.—Decided January 6, 1908.

The object of requiring the posting of the preliminary notice of mining claims is to make known the purpose of the discoverer and to warn others of the prior appropriation; and one having actual knowledge of a prior location and the extent of its boundaries, the outlines of which have been marked, cannot relocate it for himself and claim a forfeiture of the original location for want of strict compliance with all the statutory requirements of preliminary notice.

The determination by the trial court that the locators of a mining claim had resumed work on the claim after a failure to do the annual assessment work, required by § 2324, Rev. Stat., and before a new location had been made, and the finding by the highest court of the State that such determination is conclusive, do not amount to the denial of a Federal right set up by the party claiming the right to relocate the claim, and this court cannot review the judgment under § 709, Rev. Stat.

Quære and not decided, whether a forfeiture arises simply from a violation of a mining rule established by miners of a district which does not expressly make non-compliance therewith work a forfeiture.

149 California, 50, affirmed.

THE facts are stated in the opinion.

rules in this respect would not work a forfeiture of title, inasmuch as there was nothing in the rules which made noncompliance a cause of forfeiture; that unless the rule so provided, the failure to comply with its requirements would not work a forfeiture. The court cited other California cases to the same point and cases from the Supreme Court of Arizona, *Rush* v. *French*, 1 Arizona, 99; *Johnson* v. *McLaughlin*, 1 Arizona, 493; also the decision of Judge Sawyer in *Jupiter Mining Company* v. *Bodie Consolidated Mining Company*, 11 Fed. Rep. 666. There seems to be a conflict in state decisions upon this subject. The Supreme Court of Montana differs with the Supreme Court of California. *King* v. *Edwards*, 1 Montana, 235, 241. As does also the Supreme Court of Nevada. *Mallett* v. *Uncle Sam G. & S. M. Company*, 1 Nevada, 188. Lindley, in his work on Mines, seems to prefer the California rule as a "safe and conservative rule of decision, tending to the permanency and security of mining titles." 1 Lindley on Mines (2d ed.), § 274. But in view of the facts of this case we do not deem it necessary to decide whether a forfeiture will arise simply from a violation of this mining regulation.

It appears in this record that McWhirter's location was made about three years after the Coyle location, and after the record of the notice and the marking of the claim on the grounds so that the boundaries could be readily seen. Furthermore it appears from the testimony of McWhirter:

"I knew the Jim Blaine Mine, formerly the Slap Jack Mine. I went on the property first on Saturday, December 31st, 1898. I went with James Paul. I looked over the ground. Mr. Paul showed me the boundaries of the claim. I ascertained the different points of the claim and the monuments. . . . When I attempted to locate the claim known as the Jim Blaine Mine I was attempting to 'jump' or relocate the Slap Jack Mine. The ground embraced within the exterior boundaries of the Jim Blaine Mine was the same ground included within the exterior boundaries of the Slap Jack Mine. When I was on the ground on December 31, 1898, I knew the boundaries of

the Slap Jack Mine. They were pointed out to me by Mr. Paul on December 31, 1898."

In further course of examination he testifies that he was sent up by another party to jump the Slap Jack Mine. McWhirter was not undertaking to take advantage of the want of notice, but was "jumping" the claim on the theory that the required amount of assessment work for 1898 had not been done. To hold that the want of notice under such circumstances would work a forfeiture would be to permit the rule to work gross injustice and to subvert the very purpose for which it was enacted. The object of posting the preliminary notice of the claim is to make known the purpose of the discoverer to claim title to the same to the extent described and to warn others of the prior appropriation. Lindley on Mines (2d ed.), § 350. In this case the locator had gone beyond this preliminary notice; the outlines of the claim had been marked, and the extent of the claim was fully known to McWhirter when he attempted his location. He knew all about the location and boundaries of the claim that any notice could have given him. He undertook to locate his new claim precisely within the boundaries of the old one, and was seeking to take advantage of the want of compliance with the statutory requirement as to the amount of annual assessment work to be done. Having this knowledge, we hold that McWhirter, and those claiming under him, could not claim a forfeiture of title for want of preliminary notice under the former location. We thus dispose of the only question which could be held to raise a Federal question. Upon the other points made as to the McWhirter interest, we think this case presents no Federal question.

The contention is made that the assessment work required by § 2324, Rev. Stat., was not done for the year 1898. As pointed out by the Supreme Court of California, § 2324 provides: The mine "shall be open to relocation in the same manner as if no location of the same had ever been made, provided the original locators, their heirs, assigns or legal

representatives, have not resumed work upon the claim after failure and before such location." The trial court found that the work had been resumed before the attempted adverse location. After reciting the conflict of testimony in the trial court as to whether the work had been resumed within the meaning of the statute, so as to prevent such adverse location, the Supreme Court said: "It was for the trial court to determine this conflict, which it has done by the finding in question, and its determination is conclusive upon this appeal."

In thus deciding the Supreme Court of the State did not, within the meaning of § 709, Rev. Stat., decide any right of Federal origin adversely to the plaintiffs in error. It simply held that there was a conflict of testimony in the record upon this subject, and that the conclusion of the court below upon this matter of fact was conclusive upon the appellate court. This does not amount to a denial of a Federal right, concerning which the plaintiff in error had especially set up his claim so as to give the right of review of the decision of the state Supreme Court in this court. *Dower* v. *Richards*, 151 U. S. 658, and cases therein cited.

The judgment of the Supreme Court of California is

Affirmed.